

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 9th March, 2016**
Judgment pronounced on: 19th April, 2016

+ **Arb.P.No. 255/2015**

PRISTINE LOGISTICS & INFRA PROJECTS PVT. LTD. & ANR

..... Petitioners

Through Mr.M.S.Ganesh,Sr.Adv. with Mr.K.
Seshachari and Mr. Ravikesh Sinha,
Advs.

versus

ETA ENGINEERING PVT. LTD. & ORS. Respondents

Through Ms. Diya Kapur, Adv. with Ms.
Manjira Dasgupta, Adv. for R-1 &
2

CORAM:

HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. Two petitioners namely (i) Pristine Logistics & Infra Projects Pvt. Ltd. (ii) Kanpur Logistics Park Pvt. Ltd. have filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') against three respondents namely (i) ETA Engineering Pvt. Ltd. (ii) M/s Freightstar Pvt. Ltd. (iii) Aeren R Logistics & Infrastructure Pvt. Ltd. seeking relief to refer the disputes between the parties to the sole Arbitrator arising on the basis of an Agreement dated 5th January, 2011.

2. Brief facts of the case are that the petitioners herein entered into a Shareholders (cum Share Subscription) Agreement dated 5th January, 2011

wherein the respondent No.1 agreed to purchase shares in petitioner No.2 Company for a consideration of Rs.7 crores who paid Rs.2.5 crores as part of the said consideration. The balance amount was to be paid by 25th March, 2011 or other date as may be mutually extended in writing by the said parties.

3. On 20th April, 2011, respondent No.1 wrote to the petitioners that it was transferring its logistics business to respondent No.2 and accordingly the Agreement be amended to incorporate the said factum and the closing date be extended to 30th April, 2011.

4. The petitioners agreed that the Agreement dated 5th January, 2011 was amended by entering into a new Shareholders Agreement dated 30th April, 2011 which superseded/novated/discharged the earlier SHA. The said fact was not denied by the petitioners who are also admitting the execution of new shareholders agreement.

5. Admittedly, as per the Agreement dated 30th April, 2011, Rs.5 crores stood paid as share consideration (Rs. 2.5 crores paid by ETA previously was acknowledged in the annexure of Agreement dated 30th April, 2011 as having been paid under Agreement dated 30th April, 2011, but despite respondent No.2 offering to pay the balance, the petitioners refused to issue the shares and also refused to refund the balance share consideration.

6. The respondent No.2 therefore filed a petition being A.A.No. 355/2013 under Section 11 of the Act before this Court seeking reference of disputes between the parties only under Agreement dated 30th April, 2011. The petitioners in A.A.No. 355/2013 filed a reply seeking appointment of an arbitrator under the Agreement dated 5th January, 2011.

It was prayed that “refer the subject matters of the Shareholders Agreements dated 5th January, 2011 and 30th April, 2011 be adjudicated by way of appointment of a Sole Arbitrator”.

7. The said prayer was declined by order dated 20th March, 2014 passed by this Court, however an Arbitrator was appointed only under Agreement dated 30th April, 2011. The petitioners thereafter filed an application being I.A. No. 16357/2013 seeking clarification before this Court in A.A.No. 355/2013 which was also dismissed by an order dated 12th September, 2014.

8. The petitioners thereafter filed a Special Leave Petition against the order dated 12th September, 2014 in the Supreme Court however, later on the same was withdrawn by the petitioners. The order passed by this Court was upheld, however the petitioners reserved its right to file petition under Section 11 of the Act if circumstances so warrant. In view of the liberty granted, the petitioners filed the present petition.

9. In the meanwhile, a final award dated 6th November, 2015 has been passed by Retd. Judge of this Court with respect to the Agreement dated 30th April, 2011 which has been challenged by the petitioners on filing of objection under Section 34 of the Act which is pending before co-ordinate Bench of this Court.

10. It is the case of the respondents that the present petition filed by the petitioners is an abuse of process of law. The same is not maintainable. It is alleged that the Agreement dated 5th January, 2011 was discharged/superseded/replaced/novated by the agreement dated 30th April, 2011 and no longer subsists. There is thus no subsisting arbitration

agreement. The factum of subsequent Agreement is not denied by the petitioners.

11. The contention of the petitioners is that the said Agreement dated 5th January, 2011 has not perished and the arbitration clause 14.10.1 subsists for exercise of powers and jurisdiction by this Court to grant this prayer although counsel for the petitioners has not denied the fact that amended Agreement was executed on 30th April, 2011 which was also acted upon. It is also not denied by him that disputes decided on basis of the agreement dated 30th April, 2011 in which the award is published against the petitioners who have filed objection under Section 34 of the Act.

12. Counsel for the petitioners submits that respondent No.2 was not a party to the agreement dated 5th January, 2011, whereas respondent No.1 was not a party to the agreement dated 30th April, 2011. His only submission in the present proceedings filed under Section 11 of the Act is that the parties to the agreement dated 5th January, 2011 and the agreement dated 30th April, 2011 are different, the latter cannot in law supersede, novate, rescind or alter the former. The respondents have stated that all relevant parties are executing parties to the agreement dated 30th April, 2011.

13. It is also argued by the counsel for the petitioners that it is nobody's case that the Agreement dated 5th January, 2011 is *non est* or it never came into existence, but on the contrary, it was mentioned in the recital of the Agreement dated 30th April, 2011 that "*this agreement shall supersede.... the SHA signed .. on 5th January, 2011*". Thus, the Agreement dated 30th April, 2011 acknowledges the validity of the earlier Agreement. The

petitioners also admit the validity of the earlier Agreement dated 5th January, 2011 as well as the subsequent Agreement dated 30th April, 2011.

14. In the present case, admittedly, Agreement dated 5th January, 2011 was discharged by mutual agreement and substituted with SHA 30th April, 2011 which is admitted by the petitioner. It is also clear from the following:-

a. Clause F of the Recital-“ This Agreement shall supersede the SHA signed between party A and Party B dated 18th September,2009 and the SHA signed between party A, party B and party C on 5th January, 2011”

b. List of Dates of the present petition-“ In terms of the request made by the respondent No.1, a fresh SHA dated 30th April, 2011 was signed between the petitioners and the respondent No.2 and 3 in replacement of the earlier SHA dated 5th April, 2011.

c. Para 31 of the Petition- “ A fresh SHA dated 30th April, 2011 was signed between the petitioners and the respondents No.2 and 3 in replacement of the earlier SHA dated 5th April, 2011...”

15. It is settled law that an arbitration agreement contained in a contract cannot be invoked to seek reference to any dispute when the contract is discharged by mutual agreement and the parties accept a substitute contract. Reliance is placed on *National Insurance Company Limited v. Boghara Polyfab Private Ltd.* (2009) 1 SCC 267 (para 27,28 and 29)

16. It is also settled law that if the original contract has no legal existence, the arbitration clause also cannot operate as since “the original

contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it”. Reliance is placed on *Union of India v. Kishorilal Gupta* AIR 1959 SC 1362 (para 10), *Damodar Valley Corporation v. K.K.Kar* AIR 1974 SC 158 (para 7), *Young Achievers v. IMS Learning Resources* 191 (2012) DLT 378.

i. In the case of *Kishorilal Gupta* (supra) it was held as under:-

“29. This decision is not directly in point; but the principles laid down therein are of wider application than the actual decision involved. If an arbitration clause is couched in widest terms as in the present case, the dispute, whether there is frustration or repudiation of the contract, will be covered by it. It is not because the arbitration clause survives, but because, though such repudiation ends the liability of the parties to perform the contract, it does not put an end to their liability to pay damages for any breach of the contract. The contract is still in existence for certain purposes. But where the dispute is whether the said contract is void ab initio, the arbitration clause cannot operate on those disputes, for its operative force depends upon the existence of the contract and its validity. So too, if the dispute is whether the contract is wholly superseded or not by a new contract between the parties, such a dispute must fall outside the arbitration clause, for, if it is superseded, the arbitration clause falls with it. The argument, therefore, that the legal position is the same whether the dispute is in respect of repudiation or frustration or novation is not borne out by these decisions. An equally illuminating judgment of Das, J., as he then was, in *Tolaram Nathmull v. Birla Jute Manufacturing Co. Ltd.* [ILR (1948) 2 Cal. 171] is strongly relied upon by the learned counsel for the appellant. There the question was whether an arbitration clause which was expressed in wide terms would take in a dispute raised in that case. It was contended on one side that the contract was void ab initio and on the other side that, even on the allegations in the plaint, the contract was not ab initio void. The learned Judge, on the facts of that case, held that no

case had been made out for staying the suit and therefore dismissed the application filed by the defendant for stay of the suit. The learned Judge exhaustively considered the case-law on the subject and deduced the principles and enumerated them at p. 187. The learned Judge was not called upon to decide the present question, namely, whether an arbitration clause survived in spite of substitution of the earlier contract containing the arbitration clause by a fresh one, and therefore we do not think that it is necessary to express our opinion on the principles culled out and enumerated in that decision.

23. The following principles relevant to the present case emerge from the aforesaid discussion: (1) An arbitration clause is a collateral term of a contract as distinguished from its substantive terms; but nonetheless it is an integral part of it; (2) however comprehensive the terms of an arbitration clause may be, the existence of the contract is a necessary condition for its operation; it perishes with the contract; (3) the contract may be non est in the sense that it never came legally into existence or it was void ab initio; (4) though the contract was validly executed, the parties may put an end to it as if it had never existed and substitute a new contract for it solely governing their rights and liabilities thereunder; (5) in the former case, if the original contract has no legal existence, the arbitration clause also cannot operate, for along with the original contract, it is also void; in the latter case, as the original contract is extinguished by the substituted one, the arbitration clause of the original contract perishes with it; and (6) between the two falls many categories of disputes in connection with a contract, such as the question of repudiation, frustration, breach etc. In those cases it is the performance of the contract that has come to an end, but the contract is still in existence for certain purposes in respect of disputes arising under it or in connection with it. As the contract subsists for certain purposes, the arbitration clause operates in respect of these purposes.”

- ii. In the case of *National Insurance Company Limited* (supra) it was held as under :-

“29. It is thus clear that the arbitration agreement contained in a contract cannot be invoked to seek reference of any dispute to arbitration, in the following circumstances, when the contract is discharged on account of performance, or accord and satisfaction, or mutual agreement, and the same is reduced to writing (and signed by both the parties or by the party seeking arbitration):

(a) where the obligations under a contract are fully performed and discharge of the contract by performance is acknowledged by a full and final discharge voucher/receipt, nothing survives in regard to such discharged contract;

(b) where the parties to the contract, by mutual agreement, accept performance of altered, modified and substituted obligations and confirm in writing the discharge of contract by performance of the altered, modified or substituted obligations;

(c) where the parties to a contract, by mutual agreement, absolve each other from performance of their respective obligations (either on account of frustration or otherwise) and consequently cancel the agreement and confirm that there are no outstanding claims or disputes.”

17. In view of the admitted facts and the clauses of the subsequent Agreement dated 30th April, 2011, it is clear that the earlier Agreement was novated, the said fact cannot be denied by the petitioners. All the arguments raised by the petitioners are an afterthought and misconceived. Thus, no ground is made out by the petitioners to allow the prayer made in the present petition.

18. Even otherwise, on the face of the record, the petition is barred by limitation. The cause of action, if any, under the Agreement dated 5th January, 2011 admittedly arose on 25th March, 2011 when such suggestion was made. The relevant dates are i) the date of closing as contemplated under the Agreement dated 5th January, 2011 and ii) in any event before

30th April, 2011, therefore, the period of limitation to file the present petition expired in the year 2014 i.e. 3 years from when the cause of action arose. The present petition was filed on 29th April, 2015. It is settled law that if a petition is ex facie barred by limitation, such claims are time barred. Reliance is placed on *National Insurance Company Limited* (supra) (para 22, 22.1, 22.2), *Shri Satender Kumar v. Municipal Corporation of Delhi* (2010) 168 DLT 15(Del.), *Major(Retd.) Inder Singh Rekhi v. Delhi Development Authority* 1988(2) SCC 338 and *Union of India v. L K Ahuja & Co.* 1988 (3) SCC 76.

In the case of *Shri Satender Kumar* (supra) it was held as under:-

“13. The conclusion with respect to the issue of limitation therefore is that there is a separate limitation for filing of a petition seeking reference of disputes to Arbitration and which is separate from a decision on merits whether the claims are within limitation or not. The latter aspect is not seen, ordinarily, at the time of passing of an order referring the disputes to arbitration, however, if the claims which are sought to be referred are clearly barred by time on the date of filing of the petition for referring of the disputes to arbitration, then, a petition seeking reference of the disputes to arbitration is dismissed. When I say that the disputes are barred by limitation on the date of filing of the petition, what I mean, and what was meant by the learned Single Judge in the case of *Progressive Construction* (supra) and the Hon‘ble Supreme court in *L.K.Ahuja’s* case, is that ex facie the claims are barred by limitation i.e., from the admitted facts, it can be made out that the claims are barred by limitation. If, however, there is a disputed question of fact to decide the issue whether the claims are time barred or not, then, this issue is left open for decision in the arbitration proceedings.

19. Under these circumstances, it is evident that the Agreement dated 5th January, 2011 between the parties to the said Agreement was already novated/discharged with open eyes even as per admissions made by the petitioners in judicial proceedings.

20. The present petition has been filed as an afterthought. After novation of agreement, fresh Agreement was executed on 30th April, 2011, the petitioners have received huge payment under the said Agreement which was admittedly acted upon.

21. The petitioners' objections under Section 34 of the Act pertaining to the disputes of subsequent agreements are pending. Therefore, the prayer made in the present petition cannot be granted.

22. The petition is accordingly dismissed.

23. No costs.

(MANMOHAN SINGH)
JUDGE

APRIL 19, 2016